Rahn Sonoma Limited, d/b/a Sonoma Mission Inn and Spa *and* Hotel, Motel & Restaurant Employees & Bartenders Union Local 18, Hotel Employees and Restaurant Employees International Union, AFL–CIO. Cases 20–CA–26852, 20–CA–26913, and 20–CA–26968

January 23, 1997

DECISION AND ORDER

BY MEMBERS BROWNING, FOX, AND HIGGINS

On August 27, 1996, Administrative Law Judge Jay R. Pollack issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Rahn Sonoma Limited, d/b/a Sonoma Mission Inn and Spa, Boyes Hot Springs, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent has requested oral argument. This request is denied as the record, exceptions, and brief adequately present the issues and positions of the parties.

[2] Although the judge's decision contains some language suggesting that "threats" were a reason for the discipline imposed on M. Hurtado and Contreras, the judge makes no finding as to the precise nature of any such threats. However, the judge concluded, and we agree, that the Respondent has not shown that those employees would have been suspended or discharged for unprotected threats irrespective of their status as union supporters. Indeed, the record shows that other employees engaged in comparable conduct and that they were not similarly punished.

Lucile L. Rosen and *Kathleen C. Schneider, Esqs.*, for the General Counsel.

Robert L. Murphy, Esq. (Stokes & Murphy), of Santa Monica, California, for the Respondent.

Andrew Kahn, Esq. (Davis, Cowell & Bowe), of San Francisco, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at San Francisco, California, on March 5–8, and 11–12, 1996. On July 28, 1995, Hotel, Motel & Restaurant Employees & Bartenders Union Local 18, Hotel Employees and Restaurant Employees International Union, AFL–CIO (the Union) filed the charge in Case 20–CA–26852 alleging that Sonoma Mission Inn and Spa (Respondent)[1] committed certain violations of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act). On September 6, the Union filed an amended charge in Case 20–CA–26852. Also on September 6, the Union filed the charge in Case 20–CA–26913 against Respondent. That same date, the Union filed the charge in Case 20–CA–26968 against Respondent alleging that Respondent violated Section 8(a)(5), (3), and (1) of the Act. On September 28, the Regional Director for Region 20 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing against Respondent in Case 20–CA–26852 alleging that Respondent violated Section 8(a)(3) and (1) of the Act. On October 28, the Regional Director issued a complaint in Case 20–CA–26913, consolidating it for hearing with the prior complaint. On November 29, the Union filed a first amended charge in Case 20–CA–26968. On February 8, 1996, the Union filed its second amended charge in Case 20–CA–26968. On February 14, 1996, the Regional Director issued an amended consolidated complaint in all three cases. The consolidated complaint was further amended during the hearing. Respondent filed timely answers to the complaints, denying all wrongdoing.

All parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Upon the entire record, from my observation of the demeanor of the witnesses,[2] and having considered the posthearing briefs of the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a California corporation with an office and principal place of business located in Boyes Hot Springs, California, where it is engaged in the operation of a hotel and spa. Annually, Respondent derives revenues in excess of $500,000 and purchases and receives goods and products valued in excess of $1500 which originate from points located outside the State of California. Accordingly, Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent admits and I find that Hotel Employees and Restaurant Employees International Union, AFL–CIO is a

[1] The name of the Respondent was corrected at the hearing to read Rahn Sonoma Limited, d/b/a Sonoma Mission Inn and Spa.

[2] The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of believe.

labor organization within the meaning of Section 2(5) of the Act. I further find that the Union herein, a local affiliated with the International, is a labor organization within the meaning of the Act. The evidence shows that employees participated in the Union, for the purpose of dealing with Respondent as their employer concerning terms and conditions of employment. See, e.g., *Electromation Inc.*, 309 NLRB 990 (1992).[3]

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Issues*

On July 19, 1995, Alicia Sanchez, an organizer for the Union, met with employees of Respondent's housekeeping department and obtained signed union authorization cards. On July 27, Sanchez went to Respondent's executive offices with a group of the employees to demand recognition by Respondent of the Union as exclusive bargaining representative of the employees. Respondent's general manager, Jack Burkam, was not present and Sanchez left a demand letter and copies of union authorization cards with Burkam's assistant. Before Sanchez left the offices she announced in the presence of Dan McDonald, Respondent's then executive housekeeper, that she had signed authorization cards from a majority of the housekeeping employees.[4]

The following day, approximately 30 of Respondent's housekeeping employees engaged in a work stoppage and picketed near the main entrance to the hotel. After 1-1/2 hours, the striking employees offered to return to work. Respondent told the employees that they had been replaced for the day and that they should return for work the following day. Those not scheduled for the next day were told to return on their next scheduled workday.

The complaint alleges that Respondent unlawfully refused to allow the employees to return to work their regularly scheduled shifts on July 28. There is no dispute that the employees were permitted to work their regular shifts on July 29 and thereafter. Next, the General Counsel contends that Respondent hired 14 employees on July 28, in order to "pack the unit" and dilute the Union's majority.

The complaint further alleges that Respondent through its agents promised to remedy grievances, threatened employees in order to dissuade its employees from engaging in a strike or supporting the Union, encouraged employees to withdraw from the Union, interrogated employees, engaged in surveillance of employee picket line conduct, prohibited employees from talking about the Union, discriminatorily enforced its grooming rules to prohibit the wearing of union buttons, refused to recall employees from layoff, suspended three employees, discharged two employees, reduced the hours of employees, denied a raise, and denied a vacation and vacation pay in order to discourage union membership and activities. The General Counsel seeks a bargaining order to remedy the alleged unfair labor practices.

Respondent contends that it did not permit the employees to return to work on the day of the strike because of administrative difficulties. Respondent had already assigned room keys and housekeeping carts to replacements. Further, replacement employees had already been called to work and were in transit. Thus, Respondent told the returning strikers to return on their next scheduled workdays. Respondent admits that it hired 14 housekeeping employees on July 28. According to Respondent, it did not know whether there would be additional work stoppages and it needed employees to call in the event of further work stoppages. Additionally, Respondent's work complement was below its normal level for its busiest season (August through October). Thus, Respondent chose to keep the replacements hired on July 28 even after the employees returned to work because the additional hiring merely brought the work force to the same number of employees on the payroll as the previous two summers. Respondent denies the unfair labor practices alleged in the complaint. Finally, Respondent contends that the complaint cannot support a bargaining order remedy because the Union did not obtain majority support among the employees and because the General Counsel did not establish unfair labor practices substantial enough to support such a remedy.

B. *Facts and Preliminary Conclusions*

1. Events of July 27 and 28

On July 27, Alicia Sanchez accompanied by a group of employees went to Respondent's executive offices to demand recognition from Jack Burkam, Respondent's general manager. Burkam was busy elsewhere in the hotel. Dan McDonald, then Respondent's executive housekeeper, came to the office and asked Sanchez the purpose of her visit. Eventually a sheriff arrived and Sanchez was asked to leave. Before she left, Sanchez stated that the Union had authorization cards from a majority of the housekeeping employees and that she had come to request recognition for bargaining. Sanchez left copies of signed union authorization cards with Burkam's assistant. When Burkam later received the copies of the union cards, he had them sent to Respondent's counsel.

On the following morning some of the housekeeping employees were scheduled to report to work at 8 a.m and some were to report at 9 a.m. However, rather than report to work, the employees formed a picket line near the front entrance to the hotel. There were approximately 25 employees and five nonemployees on the picket line with Sanchez. McDonald came out to the picket line and asked the employees to return to work. None of the employees returned to work at that time.

Shortly after 8 a.m., Burkam directed Respondent's personnel office to obtain managers and employees to replace the striking employees. The hotel was completely booked for that evening and therefore, 168 rooms had to be made up for guests no later than 4 p.m. that evening. The cleaning of the rooms was accomplished by managers and replacements.

At approximately 9:30 that morning[5] the employees sought to return to work. McDonald told the employees that they

[3] In Case 20–RC–17123, the Acting Regional Director found that the Union was a labor organization within the meaning of Sec. 2(5) of the Act. No Request for Review of that decision was made. See Sec. 102.67(f) of the Board's Rules and Regulations.

[4] McDonald was discharged in August 1995. He was later replaced as executive housekeeper by his assistant, Ana Maria Gomez.

[5] The General Counsel argues that the employees attempted to return to work at 3 minutes after 9 a.m. I find no credible evidence to support that argument. One employee testified that she returned at exactly 9 a.m. but then changed that testimony to a few minutes after 9 a.m. I do not credit that testimony. Rather based on the testi-

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had been replaced for the day and that they should return to work the next morning. Some employees stated that they were not scheduled to work that day. McDonald told the employees to report on their next scheduled workday. McDonald made it clear that the employees were not discharged. Although the employees did not strike again after July 28, picketing continued through October. Employees and some nonemployees picketed after work and on days off.

After the employees offered to return to work on July 28, Sanchez accompanied by some employees attempted to speak with Burkam. Burkam said he didn't know Sanchez and wouldn't speak with her. Burkam offered to speak with any of the employees. None of the employees took up Burkam on his offer.

As mentioned earlier, Respondent hired 14 employees in the housekeeping department on July 28. Ten of the employees hired were housekeepers and four were laundry attendants. Respondent hired these employees by calling applicants who had open applications pending in Respondent's personnel office.[6] Thirteen of these employees started work on July 28 and the other employee started on July 29. The record shows that Respondent's employee complement was down from the previous two summers and that these hirings brought the employee complement to a normal level. Burkam testified that he decided to retain the new hires for two reasons: (1) he did not know whether the employees would engage in more strikes; and (2) he needed to increase the work force for the busy months of August, September, and October. The credited evidence shows that Respondent would have increased its work force for these months, the only change was that the strike caused the hiring to occur in 1 day rather than over a period of time.

For the following reasons, I find that Respondent did not violate the Act by refusing to return the strikers immediately upon their offer to return to work. It has long been established that during a strike an employer may hire permanent replacements to continue to operate its business, and that proof of such action constitutes legitimate and substantial justification for refusing to reinstate those strikers so replaced. *NLRB v. Great Dane Trailers*, 388 U.S. 26. 34 (1967); *NLRB v. Mackay Radio Co.*, 304 U.S. 333, 345–346 (1936). It is the employer's burden to prove its affirmative defense that the alleged discriminatees were permanently replaced. *Augusta Bakery Corp.*, 298 NLRB 65 (1990), enfd. 957 F.2d 1467 (7th Cir. 1992); *Aqua-Chem, Inc.*, 288 NLRB 121 (1988). Such proof must be specific and must show a mutual understanding between the employer and the replacements that they are permanent. *Chicago Tribune Co.*, 304 NLRB 259 (1991); *Hansen Bros. Enterprises*, 279 NLRB 741 (1986), enfd. 812 F.2d 1443 (D.C. Cir. 1987), cert. denied 484 U.S. 845 (1987). Recently, in *O.E. Butterfield, Inc.*, 319 NLRB 1004 (1995), the Board held that in both representation cases and unfair labor practice cases it would presume that replacements for strikers are temporary employees and that the employer must "show a mutual understanding between itself and the replacements that they are permanent." The Board further affirmed that evidence that a replacement was "full-time" is not sufficient to establish that the employee was hired as a permanent replacement. Here, there is no evidence that the replacements were hired as permanent replacements. At the time of hire, Respondent did not know whether the new hires were needed for 1 day or longer. The employees were hired for indefinite periods of time without limits on the duration of their employment. There is no evidence of a mutual understanding that the employees were hired as permanent replacements. Since, the employees were not hired as permanent replacements, it must be presumed that they were hired as temporary replacements. However, after the strikers offered to return to work and were reinstated effective the next day, Burkam chose to retain the new hires, not as replacements but as additions to the work force.

The Board recognizes that an employer faced with the return to work of numerous strikers faces administrative difficulties in placing the strikers back to work and in dismissing the replacements lawfully hired. See *Drug Package Co.*, 228 NLRB 108, 113–114 (1977); *National Car Rental System*, 237 NLRB 172 (1978).

In *Snowshoe Co.*, 217 NLRB 1056 (1975), the employer was faced with unconditional offers to return to work from eight strikers. The Board found that the employer did not violate the Act by agreeing to put seven of the strikers back to work the next day. The Board found that the offers of reinstatement were timely and that the employer had shown legitimate and substantial business justification for the day's delay in affording the strikers reinstatement. In the instant case, Respondent was faced with the difficulty of getting the hotel rooms ready. Room keys and housekeeping carts were already assigned. Respondent's managers were cleaning rooms. Further, replacement employees were already in transit. Under these circumstances, Respondent's refusal to return the approximately 20 strikers until the next day seems reasonable. Thus, I find that Respondent has shown legitimate and substantial business justification for the day's delay in reinstating the strikers.

The Board has held that when an employer hires a substantial number of employees in order to "pack the unit" and thereby dilutes a union's strength in a Board-conducted election, it is a violation of Section 8(a)(1) of the Act. *Einhorn Enterprises*, 279 NLRB 576 (1986); *Suburban Ford*, 248 NLRB 364 (1980). The issue is whether Respondent hired the employees for the purpose of defeating the Union in an upcoming election. I find that the General Counsel has not established that the hiring of the 14 employees on July 28 was for the purpose of "packing the unit" or diluting the Union's majority. As the General Counsel points out, Respondent began hiring employees in the housekeeping department the day after Sanchez sought recognition of the Union as bargaining representative. However, there is also a lawful and nondiscriminatory explanation for the timing of these hirings. Indeed, the day after Sanchez sought recognition, the employees engaged in the strike which caused Respondent to immediately obtain replacements on July 28. Thus, Respond-

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mony of Burkam and Sanchez, I find that the employees offered to return to work at approximately 9:30 a.m.

Counsel for the General Counsel contends, for the first time in her brief, that employee Anna Gomez was not permitted to work on July 29 because she was 3 minutes late. First, I find that the incident occurred on July 28 the morning of the strike and not the following day. Second, as stated above, I find the employee was approximately 30 minutes late and not 3 minutes late as contended by General Counsel.

[6] Respondent had approximately 75 applications on file at the time of the strike.

ent had legitimate and substantial business reasons for hiring employees on that date. Respondent called applicants for employment who had open job applications in its personnel office. This is consistent with Respondent's usual hiring practices. There is no evidence that Respondent sought employees known to be or thought to be against the Union. For example, Respondent did not hire relatives of management or supervisors. Further, Respondent did not attempt to hire permanent replacements for its striking employees. The strikers were all reinstated and, thereafter, Burkam decided to retain the replacements. Respondent attempted to deal with the emergency caused by the unexpected work stoppage. At the time of the strike, Respondent had not yet received a representation petition and could not have known the scope of the bargaining unit.

A fortiori, I find that Burkam had substantial business justification for retaining the employees hired in reaction to the strike. Burkam did not know whether similar strikes would take place in the future and wanted a larger pool of employees. Further, he wanted to increase the number of employees to the same level as the previous summers because August, September, and October were the busiest months for the hotel. Respondent's business records support Burkam's testimony. As stated above, there is no evidence that Respondent attempted to hire antiunion employees or that the Union was discussed with any of the new hires. The new employees were hired from applications on file with Respondent prior to the strike. Respondent hired five additional employees in August to reach the complement needed for the busy season.

The General Counsel argues that the timing of the hiring establishes a violation. However, as shown above, the timing is explained by lawful reasons. Further, the General Counsel argues a violation has been established based on the large number of hirings. However, that inference is overcome by the evidence that the employee complement was consistent with the previous two summers. Burkam testified that Respondent would have increased its work force for the busy months, strike or no strike. Burkam had previously instructed McDonald to hire more employees in the housekeeping department. The strike simply accelerated the hiring process. Based on all the evidence, I find consistent with Burkam's testimony that Respondent would have increased its work force to cover the months of August, September, and October absent any union activity. I find that the hiring process was expedited due to the unexpected work stoppage. In sum, I find that Respondent's hiring of the employees for the housekeeping department was necessitated by legitimate business reasons and was not motivated by a desire to pack the unit or dilute the Union's majority status. See *Plumbing & Industrial Supply Co.*, 237 NLRB 1124 (1978).

2. The alleged interrogations

On July 28, after the picketing began, Burkam hired Lori Hutchinson as a consultant regarding personnel matters. Hutchinson had previously been employed by the hotel as a personnel director. She is now self-employed as a consultant. Hutchinson had hired many of the housekeeping employees when she worked for Respondent and was on a friendly basis with many of the employees. After learning of the strike, Hutchinson spoke with employees in the personnel office in an attempt to determine what had led to the employees' dissatisfaction and picketing. The General Counsel alleges that Hutchinson solicited grievances and impliedly promised to remedy those grievances and interrogated employees in her meetings with employees.

Employee Ana Maria Gomez[7] testified that she spoke with Hutchinson on July 29 after Burkam, Hutchinson, and Supervisor Gomez held a meeting with all the housekeeping employees. The meeting was held in an office with the door closed. According to Ana Gomez, Hutchinson asked why Gomez wanted the Union. Ana Gomez replied that it was because things were bad at the hotel. Hutchinson took notes. Hutchinson asked who was getting the employees together and Gomez answered that all of the employees were in it together. Ana Gomez testified that she attended a meeting in the personnel office where her brother Ernesto Gomez was asked the same questions by Hutchinson. Hutchinson testified that many of the employees were her friends and that the employees replied affirmatively when asked whether they would like to speak with her. Hutchinson did not specifically deny asking Ana Gomez these questions. When asked about Ernesto Gomez, Hutchinson testified, "I don't specifically recall that. It's possible that I would have. But . . . I don't remember specifically." Accordingly, I credit Ana Gomez' version of these conversations.

Employee Jaime Hurtado met with Hutchinson for approximately 2 hours on August 1. Hutchinson asked whether Hurtado was one of the union leaders. Hurtado answered that all of the employees wanted the Union. Hutchinson said the Union would not be good for employees and asked why the employees had not gone to Burkam before going to the Union. Hurtado said that the employees believed that McDonald was following Burkam's orders and that the employees did not believe that changes would take place. Hutchinson asked, "[I]f there was a magic wand and if everything could change, what would you change." Hutchinson asked Hurtado to talk to the other employees and tell them that the union was not the right choice. Hutchinson said that employees looked to Hurtado as a leader. Hurtado admitted that this was a friendly meeting. Hutchinson did not deny questioning Hurtado as to whether he was a leader of the employees but denied asking who led the Union movement. During this meeting Hurtado told Hutchinson that the employees were unhappy with their treatment by McDonald. The employees felt that McDonald was rude and disrespectful. Further, Hurtado mentioned dissatisfaction with wages. He also remarked that the housekeeping department was understaffed. Hutchinson said the Union was not the answer and that the Union would be a disaster. She said the employees didn't need a third party. Hutchinson denied making any threats or promises.[8]

Jaime Hurtado further testified that on one occasion, Burkam said, "[H]e didn't want to be an asshole but he could be one if he wanted to" and he could fire Hurtado and his mother if he wanted to. Apparently, this statement oc-

[7] Respondent employed a housekeeper named Ana Maria Gomez and an assistant executive housekeeper (later executive housekeeper) with the same name. The employee will be referred to herein as Ana Gomez and the supervisor as Supervisor Gomez.

[8] In October, Hurtado was offered a promotion to assistant executive housekeeper. However, Hurtado turned down the offer. The General Counsel implies in her brief that this offer is evidence of union animus. The issue was not alleged in the complaint nor fully litigated and, therefore, I draw no such inference.

curred during a conversation about a warning for Maria Hurtado, Jaime Hurtado's mother. Burkam told Jaime that because Jaime Hurtado had been a good employee for a long period of time, Burkam was not going to discharge his mother but instead was going to give her another chance. Burkam did not deny this testimony. Burkam admitted that he told Jaime Hurtado that he would give Maria Hurtado another chance.

Employee Maria Hurtado, Jaime's mother, testified that on July 29, Burkam asked her why she wanted the Union. With Supervisor Gomez acting as interpreter, Burkam told Hurtado that the Union rarely fulfilled its promises. Burkam asked Hurtado if she had any problems with her supervisors since she was trying to organize a union. Maria responded that sometimes the pressure from the supervisors was too much. Burkam answered that if Hurtado had spoken with him earlier, he could have solved things.

An employer violates Section 8(a)(1) of the Act by interrogating employees about their union activities or that of other employees under coercive circumstances. *NLRB v. Prineville Stud Co.*, 578 F.2d 1292 (9th Cir. 1978); *Bremol Electric*, 271 NLRB 1557 (1984); *Pacemaker Driver Services*, 269 NLRB 971, 977–978 (1984). In analyzing the alleged interrogation I have looked at the following factors: (1) the background; (2) the nature of the information sought; (3) the identity of the questioner; and (4) the place and method of the interrogation. See *Sunnyvale Medical Center*, 277 NLRB 1217 (1985).

First, the employees involved had engaged in the union picketing and strike and, thus were open union supporters. Prior to the questioning, the employer had engaged in no unfair labor practices and there was no history of employer hostility or discrimination against union supporters. Second, I find the nature of the information sought tends to be coercive. Respondent sought to find the identity of the leader or leaders of the organizing. Having had so many employees join in the concerted action, asking the identity of the leader might lead to the inference that Respondent wanted to take adverse action against such a leader or leaders. The employees reacted by evading the question and by answering that all the employees were acting together. Respondent further questioned the employees in an attempt to learn the employee grievances which led to the organizing effort. Coupled with a question as to why the employees had not gone to Burkam first, these questions lead to an inference that Respondent would remedy grievances to avoid unionization. In fact, employees were told Burkam could have solved their problems if they had gone to him first. Third, while Hutchinson had a friendly relationship with employees, I find that consideration to be offset by the fact that she no longer worked for Respondent but was called in as a direct response to the protected concerted activity. The conversations were held in Respondent's personnel office, with the door closed. I do not find these conversations to be friendly and casual as contended by Respondent. While the employees were asked whether they would like to speak with Hutchinson, I am not convinced that employees were given a real choice in the matter. Under all of the circumstances, I find that Respondent's questioning of employees reasonably tended to restrain or coerce employees in the exercise of their Section 7 rights.

As mentioned above, Respondent asked employees why they were trying to bring in a union and what they would change if they could change things. Respondent also asked why the employees hadn't gone to Burkam first and told employees that Burkam could have solved problems had the employees gone to him first. I find that Respondent's solicitation of employee grievances and its implied promises to remedy those grievances, after the employees engaged in union activities, violated Section 8(a)(1) of the Act. *Windsor Industries*, 265 NLRB 1009, 1016 (1982).

3. Surveillance by videocamera

As stated earlier Respondent's employees began picketing on July 28 and continued to do so after the 1-day strike. Neighbors joined the employees on the picket line. The Union videotaped on the day before the picketing began. Respondent videotaped the picket line activities on the first day of picketing and continuing thereafter. The General Counsel contends that the videotaping tends to intimidate employees and plant a fear of reprisal. Respondent defends on the ground that there had been complaints from hotel guests about the noise and that the tapes might be necessary to support a petition for a temporary restraining order.

Absent proper justification it is unlawful to photograph or videotape employees engaged in Section 7 activity because such conduct has a tendency to intimidate employees and plant a fear of reprisal. *F. W. Woolworth Co.*, 310 NLRB 1197 (1993); *Waco, Inc.*, 271 NLRB 747 (1984). The taking of pictures or videotape to document trespassory activity for the purpose of making out a trespass claim is a justification the Board has recognized. *Ordman's Park & Shop*, 292 NLRB 956 (1989). However, photographing in the mere belief that "something 'might' happen does not justify Respondent's conduct when balanced against the tendency of that conduct to interfere with employees' right to engage in concerted activity." *Casa San Miguel, Inc.*, 320 NLRB 534 (1995); *F. W. Woolworth*, supra. Otherwise, an employer could always assert a subjective "fear" of trespass and obtain carte blanche to engage in this inherently intimidating conduct. Respondent argues that it received numerous complaints about noise on the picket line from hotel guests. However, the evidence reveals complaints were made on August 5 and 12, while the videotaping began on July 29. Thus, I find that Respondent began videotaping the employees prior to any proper justification and, therefore, I find Respondent violated Section 7 of the Act. However, I find that after August 5, Respondent had proper justification for videotaping the picket line at the entrance to its resort.

4. The dress code

Respondent's employee handbook, entitled "Employment Contract," contains the following rule:

> Jewelry and personalizing of uniforms is not allowed. Jewelry, badges, buttons or ornaments must not be worn on your uniform and necklaces must not be worn outside your uniform.

The General Counsel does not contend that the no-button rule is itself unlawful. Rather, The General Counsel contends that the rule was not enforced prior to the union activity and

that the rule was more strictly enforced or resurrected because the employees engaged in union activity.

Ana Gomez testified that at a meeting held on July 29, Burkam told employees that they could not wear their union buttons or union pins. More than 20 employees were wearing union buttons that day. Employees mentioned that housekeeper Evangelina Soto had been wearing a pin with a picture of her child for several weeks. Burkam said that the rule prohibited Soto's pin as well and that the pin couldn't be worn on the uniform.

Evangelina Soto also testified that Burkam said that Union buttons and pins could not be worn. Soto admitted that Burkam said her pin with the picture of her child could not be worn. Burkam denied any prior knowledge of Soto's pin. Supervisor Gomez admitted knowing that Soto had worn the pin for weeks. The General Counsel presented no other evidence that the grooming rules had been disparately enforced.

Respondent showed that the grooming rules for uniformed employees had been enforced to some degree in the past. Respondent had previously informed employees that they should be in proper uniform with name tags and that there should be no holes or tears in the uniforms. One employee was counseled that male employees could not wear earrings.

It is well settled that absent some special circumstance, such as maintenance of production and discipline, safety, or preventing alienation of customers, employees have the protected right to wear union buttons at work. See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801–803 (1945). However, this employee right is balanced against an employer's right to operate its business, and an employer may limit or even prohibit the wearing of union pins or buttons at work if "special circumstances exist." *Albertson's, Inc.*, 272 NLRB 865, 866 (1984); *Albertson's, Inc.*, 319 NLRB 93 (1995). One such special circumstance is where the display of union insignia may "unreasonably interfere with a public image which the employer has established as part of its business plan, through appearance rules for its employees." *Meijer, Inc.*, 318 NLRB 50 (1995). The Board has consistently held, however, that customer exposure to union insignia alone is not a special circumstance allowing an employer to prohibit display of union insignia by employees.

In *Burger King v. NLRB*, 725 F.2d 1053 (6th Cir. 1984), the United States Court of Appeals for the Sixth Circuit found that special circumstances existed to justify the prohibition of union buttons where an employer enforces a policy in a consistent and nondiscriminatory manner. The court found that the employer's ban on unauthorized pins was consistently enforced prior to the employees' union activities, and the policy was not created in response to union activities. In *United Parcel Service v. NLRB*, 41 F.3d 1068, (6th Cir. 1994), cited by Respondent, the Sixth Circuit found special circumstances where the employer had a longstanding policy regarding appearance rules for its employees having contact with the public. The employees involved in *United Parcel* were covered by a collective-bargaining agreement which permitted the employer to enforce appearance and uniform rules for the employees.

Here, I find that Respondent has not established the existence of any circumstances justifying the restriction of union buttons as a right guaranteed by Section 7 of the Act. *Raley's, Inc.*, 311 NLRB 1244, 1246 (1993). The evidence leads me to conclude that Respondent, after the strike, began more stringent enforcement of its dress code. The union buttons were smaller than the button worn by Soto and there was no evidence that either button interfered with the neat and clean image Respondent wished to project. Accordingly, I find that Respondent has violated Section 8(a)(1) of the Act. See *Ideal Macaroni Co.*, 301 NLRB 507 (1991).

5. Alleged threats by Burkam

Beginning on July 29, Burkam met with employees to discuss the picket line and the Union. The General Counsel alleges that at these meetings Respondent threatened employees and interrogated employees in order to discourage the union activities and picketing.

At the July 29 meeting, Burkam told employees to make sure that they could trust the Union. Supervisor Gomez translated for the Spanish-speaking employees. Burkam told the employees that one of the purposes of the picket line was to solicit people not to do business with the hotel. He said that if the picketing was successful and business dropped off, the hotel wouldn't be able to employ as many employees. He suggested that by picketing and demonstrating against the hotel, the employees were acting against their own self-interests. According to employee Eva Diaz, Burkam told the employees that he had been unaware of their dissatisfaction and asked why they had not come to him or to the personnel office. Burkam reminded the employees of the hotel's longstanding open-door policy.

Employee Jaime Hurtado testified that at one of meetings, which I find was held on August 11, Burkam stated that employees might be arrested if they disturbed the peace or made too much noise on the picket. The employees picketed again on August 11, after their workday had ended. The following day, August 12, Burkam held another meeting.[9] According to Eva Diaz, Burkam told the employees that he had thought that the problems had been worked out the day before. However, the employees decided to picket anyway. According to Diaz, Burkam accused her of being the leader. Burkam said that Diaz was putting employees in danger of being arrested for making noise and disturbing the peace on the picket line. Burkam said the neighbors of the hotel were angry. Diaz responded that Burkam need not worry about the neighbors who she said were picketing with the employees. Burkam asked how Diaz would feel if anyone lost her job. Diaz responded that the employees were acting on their own volition. Burkam's version of these statements is that he told employees that they were encouraging noise and disruption and that such conduct could lead to bad consequences. Burkam urged employees to consider the consequences when they encouraged their coworkers to engage in such conduct. I credit Burkam's version of these events. The employees handed Burkam a petition asking that he hold no further meetings to discuss the Union.

According to employee Ofelia De Haro, on October 11, Burkam told the employees that if they kept up the picket lines they would go to jail. On cross-examination, De Haro admitted Burkam said that if employees were arrested on the picket line they could lose their jobs. Employee Maria

[9] On August 12, Burkam received a memorandum concerning a customer complaint regarding the picketing of August 11. I find that the memorandum of August 12 precipitated the meeting of August 12.

Ramos testified that Burkam said that if employees got arrested they could lose their jobs. First, I note that the sheriff had been called to the picket line on several occasions including the day prior to this meeting. Second, I find Burkam's testimony regarding this meeting to be more trustworthy. Burkam testified that he never threatened that employees would be arrested for picketing. Rather, Burkam stated that if employees were arrested for disturbing the peace or other picket line misconduct, they would be unavailable for work. He further stated that if they couldn't work, they wouldn't have money for rent or to support their families.

I find that Burkam did not threaten that employees would be discharged for engaging in picket line activities. Rather, he stated that if the picketing was successful in decreasing the hotel's business, the hotel might have to reduce its work force. I find that such a statement is privileged by Section 8(c) of the Act which provides:

> Expressing any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

However, an employer's rights under Section 8(c) cannot outweigh the rights of employees granted under Section 7 of the Act. Thus, the Supreme Court in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617–619 (1969), stated:

> [An employer] may even make a prediction as to the precise effect he believes unionization will have on his company. In such a case however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. See *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 274, fn. 20 (1965). If there is any implication that an employer may or may not take actions solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment.

In the instant case, I find Burkam's statements regarding the negative effects of picketing on the employer's business are privileged. Further I find that Burkam's statements that employees arrested for unlawful picket line misconduct might lose their jobs are also privileged under Section 8(c). It was clear that Burkam was not speaking about employees engaged in protected conduct but rather employees who went beyond the protection of the law. He did not threatened to discharge such employees but rather stated the obvious; if an employee was in jail that employee could not be at work earning wages.

6. The wage increase

The General Counsel alleges that Respondent promised laundry employees a raise and threatened to take the raise away if the Union came in. The undisputed evidence shows that Respondent promised the laundry attendants that raise in March of 1995, long before the union campaign. Respondent was building a new laundry with new equipment. Burkam and McDonald told the employees that they would get a 50-cent-an-hour raise when the new laundry was fully operational and the laundry was more productive. In September, after the new laundry began operations, the employees were given a 25-cent-an-hour raise and told that they would receive the second half of the raise in a few months when the new laundry was more productive. There was no credible evidence that Respondent threatened to take the raise away.[10]

In deciding whether to grant benefits while a representation election is pending, an employer should act as if no union were in the picture. *Centre Engineering, Inc.*, 253 NLRB 419, 421 (1980). The Board does not automatically find the granting of benefits during an organizational campaign to be unlawful, but it presumes that such action will be objectionable "unless the Employer establishes that the timing of the action was governed by factors other than the pendency of the election." *American Sunroof Corp.*, 248 NLRB 748 (1980); *Honolulu Sporting Goods*, 239 NLRB 1277 (1979). In the instant case, Respondent has established that it granted a wage increase that had been promised to the employees since March. The timing of the raise was based on the completion of the new laundry and not union considerations. Accordingly, I find no violation in the granting of the wage increase to the laundry employees.

7. Maria Contreras

Maria Contreras, a laundry worker, was laid off in early July. At the time of the layoff, Contreras was asked if she was interested in other jobs at the hotel. Contreras responded that she wanted laundry work but was not interested in working as a housekeeper. Contreras joined the picketing employees on July 28.

After the picketing, Contreras went to Respondent's personnel office and spoke with Ellen Hinton, human resources manager, and Supervisor Gomez. According to Contreras, Hinton said that she had not been called to work because she was on the picket line. According to Contreras, Gomez said Contreras could lose her job if she picketed again. Contreras said she would picket after work and on her days off. Hinton testified that when Contreras asked why she had not been recalled to work on July 28, she replied that Contreras had been observed on the picket line and, therefore, the Hotel assumed that she was not available to work that day. Hinton added that since Contreras was now available for work, Hinton would speak with her boss, Helen Melendez. Melendez and Hinton decided to recall Contreras on August 4. Her layoff was converted to a leave and Contreras kept her seniority. I credit Hinton's version of these events.

On or about August 25, Contreras was called to a meeting in the personnel office with Hinton, Burkam, Supervisor Gomez, and Helen Melendez, director of human resources.

[10] Only one employee, Maria Hurtado, testified that at a meeting Burkam told the employees that if the Union won the election, the 25-cent-per-hour increase would be rescinded. I did not find Hurtado to be a reliable witness and no other employee testified to hearing such a remark. I find it unlikely if Burkam made such a threat that no other employee would have remembered it. Accordingly, I give no weight to this testimony.

Burkam told Contreras that he had received a complaint that Contreras had threatened employee Irma Alcala. Alcala had also made complaints against employees Maria Hurtado and Gloria Gutierrez. Contreras denied making any remarks toward Alcala. Contreras returned to work. On September 1, Contreras received a letter reviewing the conversation of August 25 and warning Contreras that threatening, harassing, or intimidating other employees could lead to termination. Contreras was sent home early that day. Respondent also filed a charge against the Union based on the alleged threats of Contreras, Hurtado, and Gutierrez. The Regional Director dismissed the charge on the ground that it was not established that the three employees were agents of the Union.

On September 3, Contreras was again on the picket line. On September 4, Supervisor Gomez told Contreras to report to the personnel office the next day. On September 5, Contreras was told that she was discharged and given a dismissal slip dated September 3. Burkam said that "they rectified with Irma what had been said." Contreras was then discharged. Respondent contends that Contreras was suspended and then discharged for harassing Alcala and lying about it to Burkam.

Respondent produced evidence that other employees received warnings for harassment of coworkers. Employee Cesar Ake received a warning for, among other things, making unwanted sexual remarks and jokes about another employee." Employee Kim Allen was suspended for three days for gossiping and spreading rumors about other employees and six other offenses. Employee Gael Menze received a verbal warning for gossiping and spreading rumors. However, that warning also listed six other offenses. Employee DeeDee Leastenfeltz received a verbal warning for negative remarks about managers. Employee Pat Speicher received a warning about language, talking, and gossiping. Further, adding to the suspicious nature of the suspension and discharge of Contreras, is the fact that Respondent did not document this discharge as it had with the discharge of other employees.

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Corp.*, 462 U.S. 393, 399–403 (1983). In *Manno Electric, Inc.*, 321 NLRB 278, 280 (1996), the Board restated the test as follows: The General Counsel has the burden to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. "The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity."

In this case, Burkam knew that Contreras was a union adherent and that Alcala had made accusations against Hurtado, Contreras and Gutierrez concerning union matters. Burkam apparently chose to believe Alcala over three other employees. Prior to Alcala's complaint, an employee had been suspended for only 3 days for worst conduct than that allegedly committed by Contreras. Respondent has not shown why Contreras was given discipline greater than that given to employees Ake, Allen, Menze, Speicher, and Leastenfeltz. Further, Respondent did not follow its normal practice of issuing written records of its disciplinary actions. Moreover, Respondent did not call Alcala, still employed by Respondent, to support its case against Contreras, Hurtado, or Gutierrez. Accordingly, I find the General Counsel has established that Respondent's suspension and discharge of Contreras was motivated by its desire to limit its employees' union activities. I further find that Respondent has not established that Respondent would have taken the same action absent the union activities. Rather, I find that under normal circumstances, Respondent would have warned Contreras but not suspended nor discharged her. I find the harsher discipline was based on a desire to interfere with union activities at the facility.

8. Gloria Gutierrez

Gloria Gutierrez worked in Respondent's laundry for 9 years before her discharge in January 1996. Gutierrez testified that in late August, Jack Burkam and Supervisor Gomez told her that Irma Alcala had complained that Gutierrez had threatened to burn Alcala's house. Gutierrez denied making any such remark. Burkam said that since Gutierrez was a longtime employee, she would not be suspended but she should consider this a warning. Respondent's records show that Burkam informed Gutierrez of Alcala's complaint on or about August 30, and gave Alcala her warning on September 1. According to Burkam, the threat occurred on July 28, but was not reported to Respondent by Alcala until mid-August. I credit Burkam as to the timing of these events.

At the end of November, other employees complained about Gutierrez harassing and intimidating them. Gutierrez was given a written warning. On or about December 25, Gutierrez was involved in a discussion with several employees. She was given a warning for harassing fellow employees about their immigration status. The warning read; "Effective immediately you have to communicate with your coworkers in a friendly, common courtesy manner. You cannot continue to question them about their personnel affairs, nor can you discuss any personnel information you have been privy to." Gutierrez was warned that any further violation of company policy or further complaints by coworkers would result in termination of her employment.

On December 30, employee Sonia Leal made a complaint against Gutierrez. Leal complained that Gutierrez had mentioned confidential information about a sexual harassment situation to another employee. On January 2, 1996, just 3 days later, Gutierrez was called into the personnel office. Burkam said he would have to terminate Gutierrez because she had not heeded his warnings. He told Gutierrez about Leal's complaint. The termination form states that Gutierrez was terminated for "Disciplinary issues including final warning due to violation of Co's anti-harassment policies. In-voluntary termination."

In this case, I find that Gutierrez because of her prior record of being a good employment was not suspended as a result of Alcala's complaint that she was threatened by the three union adherents. However, in November and Decem-

ber, Gutierrez was warned about gossiping about and harassing fellow employees. On three occasions Gutierrez did not heed warnings and Respondent received a complaint about Gutierrez on the first workday after Gutierrez' third warning. Unlike the situation regarding Contreras, Respondent had documentation to support the allegations made against Gutierrez by the other employees and to support the warnings which led to the discharge. Accordingly, I find that General Counsel has not established a prima facie case that Respondent discharged Gutierrez because of her union activities.

The fact that Respondent may have resented Gutierrez' union activities is legally inconsequential. *Klate Holt Co.*, 161 NLRB 1606, 1612 (1966); *P. G. Berland Paint City*, 199 NLRB 927, 927–928 (1972). As the Board explained in *Berland Paint City*:

> On the record it is fair to assume that the Respondent entertained a desire to get rid of [the alleged discriminatees], whose union activities it resented, and was pleased to have an opportunity present itself for doing so. But that alone is not enough to establish that the discharge was in violation of Section 8(a)(3). The mere fact that an employer may want to part company with an employee whose union activities have made him persona non grata does not per se establish that a subsequent discharge of that employee must be unlawfully discriminatory. If the employee himself obliges his employer by providing a valid independent reason for discharge—i.e., by engaging in conduct for which he would have been discharge anyway—his discharge cannot properly be labeled a pretext and ruled unlawful.

See also *Stoutco, Inc.*, 218 NLRB 645, 650–651 (1975); *Soltech, Inc.*, 306 NLRB 269 (1992); *United Charter Service*, 306 NLRB 150 (1992). Thus, I find that even if the General Counsel had established a prima facie case, Respondent has established that Gutierrez would have been discharged absent her protected conduct.

9. Maria Hurtado

Maria Hurtado testified that in on July 29, she was called to a meeting with Burkam, Hutchinson, and Supervisor Gomez. Burkam asked if Hurtado had said anything about the Union to employee Irma Alcala. Hurtado was told that Alcala had complained about Hurtado. Hurtado was told not to talk to Alcala about the Union. According to Hurtado, Burkam asked why she wanted the Union. Hurtado responded that she wanted better benefits, better treatment from supervisors, and higher wages. Burkam said that Hurtado should think about it. Hurtado answered that she didn't need to think about it. Hurtado said that she wasn't going to change her mind.

Hurtado testified that she hadn't even talked to Alcala about the Union. She told Burkam at the July 29 meeting that she hadn't even spoken to Alcala about anything. After the meeting with Burkam, Hurtado asked Alcala why she had gotten Hurtado into this "mess." Alcala said there was no problem. Hurtado told Alcala that at no time did she talk to Alcala about the Union. Alcala claimed they had talked at lunch and Hurtado insisted that they had not. Although Hurtado testified that these events occurred in late July, I find they occurred in late August just prior to Hurtado's suspension.

On August 26, Hurtado met with Burkam and was told that Alcala had accused Hurtado of threatening Alcala. Burkam told Hurtado that Alcala was frightened. Burkam suspended Hurtado for a week. When Hurtado returned to work, Burkam insisted that Hurtado apologize to Alcala. Initially, Hurtado refused to apologize. After a long discussion which included her son, Jaime Hurtado, Hurtado apologized and she returned to work the next day. When Hurtado returned to work she received a letter stating that she had first denied talking to Alcala then changed her story that she talked to Alcala but did not threaten her. Hurtado was warned that she could not threaten, intimidate, or strongly persuade other employees. Hurtado was also told to "make [Alcala] feel safe" and "not appear to bear a grudge over this incident." Burkam testified that the threat to Alcala was in August just prior to Alcala reporting the threat to Respondent.

In this case, Burkam knew that Hurtado was a union adherent and that Alcala had made accusations against Hurtado, Contreras, and Gutierrez concerning union matters. Burkam investigated and found out that Hurtado had a conversation with Alcala in which Hurtado was agitated. Based on this information, Burkam apparently chose to believe Alcala over Hurtado. Prior to Alcala's complaint, an employee had been suspended for only 3 days for worst conduct than that allegedly committed by Hurtado. Respondent has not shown why Hurtado was given discipline greater than that given to employees Ake, Allen, Menze, Speicher, and Leastenfeltz. Accordingly, I find the General Counsel has established that Respondent's suspension of Hurtado was motivated by its desire to limit its employees' union activities. I further find that Respondent has not established that Respondent would have taken the same action absent the union activities. Rather, I find that under normal circumstances, Respondent would have warned Hurtado but not suspended her for a week. I find the harsher discipline was based on a desire to interfere with union activities at the facility.

10. Miguel Diaz

General Counsel alleges that Respondent refused to recall Miguel Diaz from layoff because of his union activities. Diaz was hired as a temporary laundry attendant in March 1995. On July 2, prior to any union activities, Respondent terminated Diaz. While the General Counsel and Diaz contend that Diaz was laid off, Respondent records show that his temporary employment ended. The personnel action form for Diaz' termination indicates that he was not eligible for rehire. The comment explaining why Diaz was not eligible for rehire stated "rehire dependent on qualifications for position applied for." Diaz admitted that at the time of his termination, McDonald said that Diaz' "contract was up."

On August 7, Diaz went to Respondent's personnel office and spoke with Hinton's secretary. Diaz filled out an application and was told that the only openings were in security. Diaz was not called for an interview.

Burkam testified that Diaz was a temporary employee who was let go for attendance problems. Diaz did not deny that he had attendance problems while employed by Respondent. Burkam testified that Diaz was not eligible for rehire.

As the Board stated in *Big E's Foodland*, 242 NLRB 963, 968 (1979):

> Essentially, the elements of a discriminatory refusal to hire case are the employment application, the refusal to hire each, a showing that each was expected to be a union supporter or sympathizer, and further showings that the employer knew or suspected such sympathy or support, maintained an animus against it, and refused to hire the applicant because of such animus.

The failure to hire an employee does not violate Section 8(a)(3) if it is motivated by legitimate and substantial business reasons. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). If the unlawful purpose is not present or implied the employer's conduct does not violate the Act, even if it is unjustified or unfair. *Howard Johnson Co.*, 209 NLRB 1122 (1974). The issue is the employer's motive and the burden is on the General Counsel, *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969). The General Counsel must establish an unfair labor practice by a preponderance of the evidence. See *Wright Line*, supra; *Manno Electric*, supra. The General Counsel must show discriminatory motive or unlawful intent existed. *NLRB v. Consolidated Diesel Electric Co.*, 469 F.2d 1016 (4th Cir. 1972); *Clothing Workers v. NLRB*, 564 F.2d 434, 440 (D.C. Cir. 1977). The Board requires proof of unlawful motivation or animus as part of the General Counsel's prima facie case. *Abbey Island Park Manor*, 267 NLRB 163 (1983); *Class Watch Strap Co.*, 267 NLRB 276 (1983).

For the following reasons, I find that General Counsel has not met its burden of persuasion that Respondent was motivated by antiunion considerations in not rehiring Diaz. First, Respondent had terminated Diaz approximately three weeks before any union activity. Prior to the union activity Respondent had marked Diaz' personnel action form indicating that Diaz was not eligible for rehire. I read that form as meaning that Diaz was not eligible for rehire for his former position but might be eligible for another position, if qualified. Second, Respondent recalled Contreras from layoff in spite of the fact that Contreras openly stated that she would picket Respondent after work and on days off. Here, Respondent knew that Diaz had engaged in picketing, but there is no evidence that Respondent harbored animus against him for engaging in that activity. There is simply insufficient evidence to establish that Respondent failed to rehire Diaz for any reason other than what it considered unsatisfactory performance during his 4 months of prior employment as a temporary employee.

11. Eva Diaz

The General Counsel alleges that Respondent unlawfully denied Eva Diaz a vacation in September 1995, and denied her vacation on two occasions in October 1995. Diaz had engaged in the July 28 picketing and had spoken in favor of the Union at employee meetings.

In September, Respondent gave Diaz credit for vacation accrued in 1993 that Diaz had erroneously been denied. Thereafter, Diaz requested a vacation for the first week in October. Supervisor Gomez told Diaz that she couldn't take vacation that week because the hotel was going to be very busy that week. Shortly thereafter, Diaz injured her arm and again asked for vacation for the same week. Gomez told Diaz to see a doctor. Diaz ended up taking 2 weeks off to rest her arm. In the middle of October, Diaz asked for 2 weeks of pay in lieu of vacation. According to Diaz, Supervisor Gomez said that vacations were suspended because of the Union. I do not credit this testimony. Gomez said she would look into the matter. After receiving no answer from Gomez, Diaz went to the personnel office. Diaz testified that Hinton said that Burkam did not want to give vacation pay instead of vacation time.

According to Diaz she asked Burkam why she couldn't receive vacation pay as she had done in the past. According to Diaz, Burkam asked why didn't Diaz ask Sanchez or the Union for the money. I do not credit this testimony. Diaz answered that she worked for Respondent and not the Union. According to Diaz she had received pay in lieu of vacation in the past.

Respondent's employment contract clearly states that employees will not be given pay in lieu of vacation. Burkam and Hinton testified that they knew of no employee receiving pay in lieu of vacation. October can be the busiest time of the year for Respondent. Respondent contends that Diaz' request for vacation the first week of October was denied simply based on the need for staff during that week. Employees are encouraged to take vacation between November and March and discouraged from taking vacation during August, September, and October. Diaz took vacation from December 18 through December 24. As to the allegation that vacations were suspended for employees, Respondent's records show otherwise. Employees took vacations through out the summer and fall of 1995.

As stated above, under *Wright Line* and *Manno Electric*, supra, the General Counsel must persuade that protected conduct was a "motivating factor" in the employer's decision. Upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. For the following reasons, I find that General Counsel has not made a sufficient showing that Respondent suspended vacations or failed to pay vacation pay for Diaz in violation of Section 8(a)(3). First, the evidence establishes that Respondent did not suspend vacations for its employees. Second, Respondent's failure to permit Diaz to take a vacation during a busy week seems consistent with its regular vacation policy. This one instance where Respondent asked an employee to defer her vacation does not amount to evidence of a violation.

I also find that credible evidence fails to establish that the denial of vacation pay in lieu of vacation was based on unlawful considerations. The policy had been clearly stated in the employee handbook. This policy was invoked on at least two occasions. Finally, there was no corroboration of Diaz' testimony that she received pay in lieu of vacation in the past and I do not credit her testimony on this point.

12. Maria Ramos

Employee Maria Ramos was scheduled to receive her annual raise on August 22. However, Ramos did not receive her raise until November 20. The raise was given retroactively to August 22. The General Counsel contends that the Respondent delayed granting this raise because of its employees' union activities.

Burkam testified that often annual reviews are delayed and therefore, annual raises are delayed. However, the annual raises are then made retroactive to the employee's anniversary date so that the employee is not prejudiced by the delay. Originally the General Counsel alleged that Respondent denied raises to employees because of their union activities. The evidence did not support that allegation. In this instance, the evidence is insufficient to support the claim that Respondent delayed granting this raise because of Ramos' union activities. Rather, it appears that in this instance the raise was delayed but then granted retroactively. There is no evidence of improper motivation behind the conduct.

13. The Bargaining Order

In *NLRB v. Gissel Packing Co.*, 395 U. S. 575 (1969), the leading case on remedial bargaining orders, the United States Supreme Court held:

> (1) Even in the absence of a demand for recognition, a bargaining order may issue if this is the only available effective remedy for unfair labor practices.
>
> (2) Bargaining orders are clearly warranted in exceptional cases marked by outrageous and pervasive unfair labor practices.
>
> (3) Bargaining orders may be entered to remedy lesser unfair labor practices that nonetheless tend to undermine majority strength and impede the election process. If a union has achieved majority status and the possibility of erasing the effects of the unlawful conduct and of ensuring a fair election through traditional remedies is "slight," a bargaining order may issue.
>
> (4) Minor or less-extensive unfair labor practices that have only a minimal effect on election machinery will not support a bargaining order.

As a precondition to a bargaining order, the Board currently requires a showing that the union achieved majority status in an appropriate bargaining unit at some relevant time. *Gourmet Foods*, 270 NLRB 578 (1984). At the time of the Union's demand for recognition on July 28, the Union had obtained only 29 authorization cards in a unit of 61 employees. The Union obtained a 30th card on July 30. The General Counsel contends that the Union had 32 authorization cards. However I have not counted the cards signed by Miguel Diaz and Santos Perez.[11] Diaz had been terminated prior to July 28 and Perez was not in the appropriate bargaining unit.

By the time the Union obtained its 30th card, it had only 30 authorization cards in a unit of 75 employees. As shown above, I have found that on July 29 the unit expanded to 75 employees. I make this finding based on the fact that after Respondent hired temporary replacements, the strikers offered to return to work and were reinstated effective the next day, and Burkam chose to retain as permanent the employees previously hired as replacements. As noted earlier, five additional employees were hired during the month of August. As stated above, I have rejected the allegation that Respondent unlawfully packed the bargaining unit.

[11] Further, the General Counsel conceded that employee Esther Leal was terminated prior to July 28.

In this case, I have dismissed most of the allegations of the General Counsel's complaint. Most importantly, I have dismissed the serious allegations of refusing to reinstate strikers, hiring employees to pack the bargaining unit, and one allegation of an unlawful discharge. I have found that Respondent interrogated employees, solicited grievances and impliedly promised to remedy grievances, engaged in surveillance by videotaping, more strictly enforced its dress code, unlawfully suspended and discharged Maria Contreras, and unlawfully suspended Maria Hurtado. I find that such unfair labor practices are not so severe and egregious as to merit the issuance of an extraordinary remedy. See *Reno Hilton*, 320 NLRB 197 (1995).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(1) of the Act by more strictly interpreting and enforcing its dress code to require the removal of union buttons, coercively interrogating employees, engaging in surveillance of union activities by videotaping, soliciting employee grievances and impliedly promising to remedy grievances.
4. Respondent violated Section 8(a)(3) and (1) of the Act by suspending employees Maria Hurtado and Maria Contreras and discharging Contreras in order to discourage union activities.
5. Respondent has not otherwise violated the Act as alleged in the complaint.

REMEDY

Having found that Respondent engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

I shall recommend that Respondent offer Maria Contreras full and immediate reinstatement to the position she would have held, but for her unlawful discharge. Further, Respondent shall be directed to make Contreras and Maria Hurtado whole for any and all losses of earnings and other rights, benefits, and privileges of employment they may have suffered by reason of Respondent's discrimination against them, with interest. Backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See also *Florida Steel Corp.*, 231 NLRB 651 (1977), and *Isis Plumbing Co.*, 139 NLRB 716 (1962).

Respondent shall also be required to expunge any and all references to its unlawful suspensions and discharge from its files and notify Contreras and Hurtado in writing that this has been done and that the unlawful discipline will not be the basis for any adverse action against them in the future. *Sterling Sugars, Inc.*, 261 NLRB 472 (1982).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

[12] All motions inconsistent with this recommended Order are hereby denied. In the event no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of

ORDER

The Respondent, Rahn Sonoma Limited, d/b/a Sonoma Mission Inn, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) More strictly enforcing its dress code so as to prevent the wearing of union buttons and pins.

(b) Photographing or videotaping employees engaged in union activities without proper justification.

(c) Interrogating employees about their union activities or the union activities of other employees.

(d) Soliciting employee grievances and implying that those grievances would be remedied as an inducement to refrain from union activities.

(e) Discharging or suspending employees for engaging in union or protected concerted activities.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Maria Contreras full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make whole Maria Hurtado and Maria Contreras for any and all losses incurred as a result of Respondent's unlawful discrimination against them, with interest, as provided in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspensions and unlawful discharge, and within 3 days thereafter notify Hurtado and Contreras in writing that this has been done and that the discipline found unlawful herein will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Regional Director, post at its Boyes Hot Springs, California facility copies, in English and Spanish, of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure the notices are not altered, defaced or covered by other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by Respondent at any time since July 28, 1995.

(f) Within 21 days after service by the Regional Director, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT more strictly enforce our dress code because of our employees' union activities.

WE WILL NOT photograph or videotape employees engaged in union activities without proper justification.

WE WILL NOT interrogate employees about their union activities or the union activities of other employees.

WE WILL NOT solicit employee grievances and imply that those grievances would be remedied as an inducement to refrain from union activities.

WE WILL NOT discharge or suspend employees for engaging in union or protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Maria Contreras full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make whole Maria Hurtado and Maria Contreras for any and all losses incurred as a result of our unlawful discrimination against them, with interest.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspensions of Maria Contreras and Maria Hurtado and the unlawful discharge of Maria Contreras, and within 3 days thereafter notify Maria Hurtado and Maria Contreras in writing that this has been done and that the unlawful discipline will not be used against them in any way.

RAHN SONOMA LIMITED, D/B/A SONOMA MISSION INN AND SPA